ORAL ARGUMENT REQUESTED

Case Nos. 15-1178 and 15-1201

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LIFESOURCE,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

On Petition for Review of a Decision and Order of the National Labor Relations Board

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REPLY BRIEF OF LIFESOURCE

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SUMMARY OF ARGUMENT

It is difficult to turn a page in the Board's Brief without the Board espousing LifeSource's supposed "heavy burden" in certain aspects of this case. Noticeably absent from the Board's Brief, however, is any meaningful proof or argument that the Board meets its own burden: that its findings are "conclusive" because they are "supported by substantial evidence on the record as considered as a whole." The Board recognizes that it is governed by this burden by relying on 29 U.S.C. §160(e) (Board Br. 8), but the Board attempts to shift away from its burden by consistently asserting that, "It is LifeSource's burden to prove that the election was compromised, not the Board's burden to prove that it was not." (Board Br. 15) Yet, the Board completely loses sight of the fact that it must establish that its own findings are supported by "substantial evidence of record." The Board does not even attempt to carry this substantial, or "heavy," burden.

Likewise, littered throughout the Board's Brief are use of the terms "speculative" and "conjecture" in reference to legitimate inferences which arise from the evidence LifeSource provided to the Regional Director. There were only three individuals who could offer evidence of what actually occurred with the ballots and in the voting room, and LifeSource established irregularities by evidence from the only witness within its "control." The other two individuals who could offer firsthand evidence were in the control of the Board and the Union,

respectively. LifeSource provided evidence even with its hands tied by the Regional Director's refusal to grant LifeSource access to either of the two other individuals who had firsthand knowledge of what transpired in the voting room. On the one hand, the Board claims that the evidence is not present, but, on the other hand, it denies LifeSource access to that evidence through a hearing or compulsory process. The Board concedes that LifeSource need only show *prima facie* that a basis exists to find that the election was impermissibly tainted. LifeSource has most certainly satisfied this burden.

Contrary to the Board's arguments, it is readily apparent from the record that it was the Regional Director who engaged in "speculation" and "conjecture" by concluding affirmatively that certain conduct had not occurred without any evidentiary basis on the record for that conclusion. By way of example, the Board leads footnote 6 of its Brief with, "Because no one voted while the observers were absent." This mere conjecture and speculation by the Board is not a matter of record. Thus, the Board adopted and affirmed the Regional Director's conjecture without substantive comment.

Next, the Board in its Brief refers to the election as between the Union and the Employer and makes reference to Union and Employer "wins" and to preserving a Union "win." This is a totally misguided perspective and places a union's so-called rights above those of the employees whose rights the Act is

supposed to hold paramount. The purpose of a representation election, in its simplest terms, is for the employees involved to vote "yes" or "no" as to whether they want to be represented by a particular union. There is no reference to the Employer in any form and the employees are literally asked to "check yes or no" to designate their individual choice, which then becomes their collective choice and what Section 7 of the National Labor Relations Act ("NLRA" or "Act") is designed to protect.

Finally, by way of preface, the Board is Cross-Applying for Enforcement of its Order to the effect that LifeSource committed an unfair labor practice in violation of Section 8(a)(5) of the NLRA. As to that finding and Order, the burden, which is a "heavy" burden, is, and remains, with the Board throughout these proceedings.

ARGUMENT

A. The Board Fails to Rebut LifeSource's Argument That a New Election, Hearing or, at the Very Least, Access to Compulsory Process is Required to Protect the Employees' Rights Under the Act

The instant case is before this Court to effectuate the purposes of the Act, most notably to protect and preserve the rights of the involved employees under Section 7 of the Act. The Board asserts that LifeSource filed objections to the election because it was "disappointed" in the election results. (Board Br. 9) If there is "disappointment" in this matter, it is because the Board has turned a blind

eye to the numerous election irregularities in this case which denied employees the free exercise of their Section 7 rights to a fair election. It is the Board's admitted electoral irregularities and refusal to investigate the same in violation of all manner of laws that has denied LifeSource employees the full exercise of their Section 7 rights, not some purported disappointment in the election results. Indeed, the disappointment which is justified in this case is in the Board's failure to uphold the employee rights to which it is entrusted and its placement of the Union's objectives ahead of those rights.

As explained more fully in LifeSource's opening brief, the crux of the issue is the destruction of the laboratory conditions required in representation elections by the Board Agent charged with running the underlying election at issue in this case. The lack of laboratory conditions in this election undermined the election so significantly that the free choice of employees could not be reflected in the electoral results. *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962) (holding that election must be conducted under "laboratory conditions" to ensure employees have the opportunity to express a "free and untrammeled choice" in the election). Notwithstanding the importance of this issue, the Board does not even once acknowledge or address the importance of laboratory conditions to the free choice of employees. In fact, by failing to argue otherwise, the Board recognizes that the required laboratory conditions were indeed *not* in place during the election. Yet, it

asks this Court to ignore how this significant failure impacts the free choice of employees in this case. Instead, the Board attempts to divert attention to a concern "the standard for overturning an election is demanding because ordering a rerun election poses its own danger to the effectuation of employee free choice," the danger that the "employer" may "win" the second election. (Bd. Br. 12)[1] The Board also accuses LifeSource of "positing … unrealistic scenarios" in terms of legitimate inferences as to what could have happened with the ballots and vote. Simply stated, there are a litany of Board cases where elections were overturned because of similar such supposedly "unrealistic scenarios." Irregularities attributable to the Board Agent running the election are not taken lightly.

The Court cannot permit the Board to shift the focus of the issue as it attempts to do in this case. The potential outcome of a second, re-run election must not be the primary consideration in the Court's decision on the status of the first. Rather, the focus must remain on the election that occurred and the impact of the failed laboratory conditions on the Section 7 rights of the affected employees. While there is no reason to believe that a second election would not be conducted

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[1] This fear – that the employer will win a fairly-run election – runs counter to the rule that, "Any procedure requiring a 'fair' election must honor the right of those who oppose a union as well as those who favor it." *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973). And, as noted above, an NLRB election is about employee choice, and only about employee choice, not a tally of "wins" or "losses" for employers and unions. Too often, as is the case here, this gets lost in the shuffle by the Board.

fairly, it is beyond clear that the instant election was not. The Regional Director, whose Report and Recommendation the Board adopted, specifically found that irregularities had, in fact, occurred. He then "inferred" and attempted to minimize them to conclude that the irregularities did not affect the laboratory conditions while, at the same time, denying any legitimate inference from the Employer's evidence that the irregularities potentially did affect the outcome.

Even if the potential outcome of the second election is relevant to the question of whether the election must be overturned, the Board has not offered any evidence that it followed what it asserts is the appropriate test for such a consideration: a balance of the defects in "the original election with the risks of a rerun [to] determine which alternative will best serve the goal of vindicating employee choice." (Board Br. 12) The decisions made by the Board in this case are devoid of any discussion that demonstrates the Board's actual consideration of this balance. (J.A. 3, 8, 11) Rather, the Board merely adopted the conclusions and recommendations of the Regional Director, which are also devoid of any discussion of such a balance. (J.A. 8) The Board's silence in the face of serious election improprieties which warrant discussion of the facts clearly demonstrates that the Board rubber-stamped the Regional Director's decision without much thought. This Court should not countenance such lack of attention by the Board.

The Board's steadfast refusal to conduct a hearing on the objections or to permit access to compulsory process to explore the facts around the several irregularities that occurred during the election provide additional evidence of the Board's indifference to the Section 7 rights of LifeSource's employees. As explained in LifeSource's opening brief and this reply brief, LifeSource provided more than enough evidence to meet the Board-sanctioned standard to require the Board to hold a hearing, offering an affidavit from an Election Observer that raised material irregularities that deserved exploration and attention. These irregularities occurred in an election that deserved special scrutiny because of the propensity for election irregularities to affect the outcome – an election decided by a single vote. A hearing or access to compulsory process was indisputably necessary under these circumstances. Yet, the Board, without explanation, refused.

The Board's Decision and Order cannot stand. This Court's well-established precedent holds that Board rulings only receive deference when it has "reasonably exercised its discretion in the matter." *Amalgamated Clothing Workers of America v. NLRB*, 424 F.2d 818 (D.C. Cir. 1970). "[A]lthough our review is deferential, we are not merely 'the Board's enforcement arm.'" *Randell Warehouse of Ariz., Inc.*, v. NLRB, 252 F.3d 445, 448 (D.C. Cir. 2001), quoting *General Elec. Co. v. NLRB*, 117 F.3d 627, 630 (D.C. Cir. 1997). The Board's findings and conclusions must be supported by substantial evidence of record, not the absence thereof. It is up to

this Court and its well-founded jurisprudence to resist the Board's disregard for its electoral misconduct which potentially trammel upon the impacted employees' Section 7 rights and to vindicate those rights by requiring a new election or remanding for a hearing and/or access to compulsory process.

B. A Hearing or, at a Bare Minimum, Access to Compulsory Process are Required to Vindicate the Employees' Section 7 Rights

LifeSource clearly demonstrates that, at a bare minimum, this case must be remanded with an order that permits LifeSource access to and the use of compulsory process to obtain evidence. The Board argues that LifeSource, *inter alia*, makes "unsubstantiated and unrealistic speculation," raises "unfounded" objections to the election, and "rests on conjecture." (Board Br. 8, 9, 27) To the extent such an argument carries any weight (as discussed below, it does not), it is only supportable because of the Board's stonewalling of LifeSource's right to obtain either a hearing or, at a bare minimum, access to compulsory process like a subpoena when evidence of obvious election irregularities warrant an open disclosure of facts. *Clearwater Transport, Inc. v. NLRB*, 133 F.3d 1004, 1011 (7th Cir. 1998) ("The Board may not resolve factual disputes or draw inferences without offering the objecting party either a hearing or compulsory process to obtain evidence"); *AOTOP, LLC v. NLRB*, 331 F.3d 100 (D.C. Cir. 2003) ("The Company cannot be expected, in order to justify a hearing on the question of agency, to produce detailed information about the Union's records – the very

information to which it seeks access through the hearing and associated discovery process.")

It is disingenuous for the Board to fashion its entire argument on the faulty premise that LifeSource has presented no evidence in support of its objections while, on the other hand, steadfastly refusing LifeSource access to either a hearing or compulsory process at which further evidence would be obtainable. The Board asserts that LifeSource "had an opportunity to provide relevant evidence, but did not do so." (Board Br. 28) To the contrary, LifeSource provided information from the election observer to whom it had access, and whose affidavit demonstrated substantial and significant electoral irregularities, irregularities that the Board ultimately conceded had occurred. (J.A. 54) As stated in its opening brief, LifeSource requested of the Union Observer that she submit to an interview concerning the election day events, but she declined, presumably on advice from the Union. (LifeSource Br. 41, n.13) The only way for LifeSource to obtain information from this very critical witness was within the control of the Board and the Union. Thus, the depth of evidence provided by LifeSource is the clear result of the refusal of the Board to provide LifeSource with access to evidence through legally-required process.

LifeSource met the threshold evidentiary burden to warrant a hearing by providing specific evidence of specific events that raised reasonable doubt and

reasonable inferences as to the fairness and validity, or lack thereof, of the election through the aforementioned affidavit. *Amalgamated Clothing Workers of America v. NLRB*, 424 F.2d 818, 827 (D.C. Cir. 1970). The affidavit from one of the two Election Observers demonstrates that the irregularities occurred, and the impermissible conduct of the Board Agent alleged therein goes well beyond raising reasonable doubt about the validity of the election. Legitimate inferences from those irregularities potentially destroy the existence of the Board's required laboratory conditions. Yet, the Board rejects this evidentiary offering without any substantiation on the record for doing so and in the face of its concession that "an objecting party need not prove its case before receiving a hearing." (Board Br. 26) By denying LifeSource a hearing and opposing it now, the Board argues that LifeSource should have done just that. The Board cites *New York Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070 (D.C. Cir. 2007), and *AOTOP*, *supra*, as examples of cases where this Court has declined to remand for a hearing, but these cases are distinguishable. In *New York Rehab. Care Mgmt*., the events and conduct at issue were *not* irregularities occasioned by the Board Agent. Rather, the Board denied the employer a hearing where union representatives were electioneering outside the polling location, much less serious conduct than the admitted destruction of laboratory conditions that occurred in the instant case. Moreover, it

does not appear to be a case, like here, where the Board may have held evidence and denied the objecting party access to it.

Further, the Board asserts that no fact or credibility issues exist in this case, but that assertion is entirely incorrect. (Board Br. 27) At minimum, if the Regional Director conducted an investigation into LifeSource's objections, the credibility of the Board Agent is at issue.[2] The Board Agent, from at least one perspective, had the most at stake in this case, and her testimony about the obvious election irregularities is essential to a factual determination. Unfortunately, it is questionable that the Board conducted an investigation into LifeSource's objections. The Board attempts to subvert this Court's attention from this factual issue by suggesting that "nothing in the Regional Director's report relies on information that could have come only from the [Board] Agent." (Bd. Br. 28-29) Yet, the Board does not suggest what other individuals the investigation included. Thus, the Board has offered no evidence that the Board did, in fact, conduct an investigation. The substantial evidence of record, which the Board must proffer, is missing. Rather, it is clear that the Regional Director's "investigation" into the serious and admitted electoral irregularities consisted of not an actual investigation, but instead simply reading the affidavit submitted by LifeSource and drawing

[2] Because LifeSource was denied access to the Union Observer, LifeSource cannot know whether credibility issues exist with regard to her testimony. It is not unreasonable to infer that her testimony would not be favorable to the Union based on the withholding of her testimony.

whatever conclusions he fancied therefrom. As such, the Board appears to have admitted that the Regional Director did not even bother to interview the Board Agent whose actions are at issue, the Union Observer, or any of the employees whose Section 7 rights are at issue.

The Board's corresponding claim that it did not "need to make any credibility determinations to rule on LifeSource's objections, as no one claims that LifeSource's hypothetical vote tampering or coercion actually occurred," is severely undermined by the fact that it did not ask anyone involved, and it did not permit LifeSource the use of compulsory process to explore the facts relating to those significant improprieties. (Board Br. 28) It follows that the Board's Decision is not supported by substantial evidence of record. Additionally, to attempt to brand these claims as "hypothetical" is to suggest that legitimate and logical inferences cannot be drawn from undisputed facts and evidence. This is not the case, particularly where a party is not made privy to any other evidence that might suggest to the contrary.

Notably, the Board does not argue that it had any legal basis upon which to deny access to compulsory process. Rather, the Board attempts to bury the issue by mischaracterizing LifeSource's argument as one for either a new election or hearing. The issues are distinct. While a new election or hearing is the correct result, the Board's failure to specifically address why it must not at least afford

LifeSource access to compulsory process is telling in its silence. As such, this Court should, at the very least, remand the matter with instructions for the Regional Director to do what he is legally required to do: grant LifeSource access to compulsory process to determine if the employees' right to a free and fair election were trammeled upon.

C. LifeSource Has Demonstrated That a Hearing or New Election is Essential to Protect Employee Rights

Not only is LifeSource entitled to compulsory process, it has also established that the employees are entitled to a new election or at least an evidentiary hearing on its objections. As noted in LifeSource's opening brief, the Board Agent in charge of conducting the election engaged in and permitted numerous irregularities. (LifeSource Br. 20) Not only did the Regional Director admit that proper election procedures were not followed by the Board Agent (LifeSource Br. 8),[3] but the Board does not argue that proper procedures were followed or that the

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[3] The Board suggests that it did not admit that anyone meaningfully interacted with or studied the voter list. In the next sentence, however, the Board admits that it "noted … that some voters pointed to their names on the list for the observers." (Bd. Br.16) By admitting this fact, the Board necessarily admits that election improprieties occurred. Such conduct is a clear example of meaningful interaction with the voter list. The voters must study the list to locate their own names. In doing so, the voters can clearly view the voting status of other voters. When one identifies his or her name, it is marked off with a colored pen. One could easily and quickly identify those who had a colored mark beside their name. While the Board may refuse to admit wholesale to the improprieties that naturally occur as a result of the facts to which it does admit, one can clearly conclude that the Board

election irregularities did not occur.[4] Rather, the Board sidesteps these serious irregularities and states that LifeSource presents "unfounded conjecture," "speculation," and "unrealistic" objections, and "displays a healthy imagination, but an anemic evidentiary foundation." (Board Br. 13, 14) Labeling LifeSource's arguments with these phrases does not make them so. Further, any speculation could have been fully addressed in a hearing or through the use of compulsory process. Thus, the Board's repeated argument that LifeSource failed to meet its burden to show that the election should be overturned must fail. LifeSource has presented ample evidence to raise a reasonable doubt about the validity of the election and to demonstrate that the impacted employees are entitled to a new election.

Seemingly unmoved by the complete failure of the Board Agent to maintain the laboratory conditions required for a valid election, the Board glosses over the

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fundamentally admitted to voters studying and meaningfully interacting with the voter list.

[4] The Board asserts that the Board Agent's actions regarding the *Excelsior* list were consistent with the Board's Casehandling Manual. Nothing cited by the Board in the NLRB Casehandling Manual, however, supports the Regional Director's conclusion that the Board Agent's actions were "consistent with the procedure outlined" therein. (J.A. 25) To the contrary, the Manual does not contemplate voters easily viewing the *Excelsior* list, studying the *Excelsior* list, nor interacting with it, and for good reason. The Board recognizes this as undermining the validity of its own procedures, dismissing it as "nonbinding guidance." (Bd. Br. 17) Only a government agency would issue guidance to its employees and, after the fact, suggest it is "nonbinding." To those in the real world, "nonbinding guidance" in this context gives meaning to the term oxymoron.

magnitude of the several irregularities that occurred in this election. The Board relies upon several of this Court's decisions to support its choice to ignore the obliteration of laboratory conditions and argue against overturning the election. Each of these cases is easily distinguishable. For example, in *Hard Rock Holdings, LLC v. NLRB*, 672 F.3d 1117 (D.C. Cir. 2012), the employer challenged an election during which the Board Agent decided not to provide the observers with identification as required by the Casehandling Manual. The Board concluded that the lack of identification had no effect on the fairness and validity of the election. It is again crucial to recognize that the parties in *Hard Rock Holdings* were *afforded a hearing* to explore the impact of this election irregularity on voters. LifeSource was denied this same opportunity even though the instant election was riddled with equally if not more egregious improprieties. Thus, *Hard Rock Holdings* supports the conclusion that the parties were entitled to the due process the Board refused to provide, and, as such, the election must be overturned or a hearing or compulsory process made available in order to effectuate the employees' Section 7 rights.

Antelope Valley Bus Co. v. NLRB, 275 F.3d 1089 (D.C. Cir. 2002) is equally unavailing. In this case, the employer challenged a mail ballot election in which four employees failed to receive ballots in the mail. The Board had provided employees who did not receive ballots with methods by which to obtain

replacement ballots, but the individuals did not pursue them. The Court found that the Board provided employees with the opportunity to vote and utilized reasonable methods of doing so. A different analysis is required here. While the lost ballots in *Antelope Valley* were "the product of the 'vagaries of mail delivery'" which were timely cured, the several election irregularities in the instant case were the clear fault of the Board Agent, involving either her own conduct or the conduct of others as sanctioned and approved by her. The Board Agent – not a disinterested third party – perpetuated the violations of Board election procedure that destroyed laboratory conditions here. Moreover, in *Antelope Valley* the *parties were afforded a hearing* to explore the circumstances surrounding the missing ballots and the impact on voters. The jurisprudence relied upon by the Board supports the contention of LifeSource that the parties were entitled to the due process the Board refused to provide, and, as such, the election must be overturned or a hearing or compulsory process be made available.

The Board's reliance on *Physicians & Surgeons Ambulance Serv., Inc*., 356 NLRB No. 42, 2010 WL 4929682 (2010), deserves a similar fate. In that case, the Court upheld the Board's dismissal of the employer's objections regarding the use of a Board-sanctioned table-top voting booth. The employer alleged that the Board Agent failed to ensure the secrecy of voter balloting by placing the voting booth such that the observers could see the faces and movements of the voters as they

voted. The Court and the Board explained that the Board had not set aside an election contesting the secrecy of votes where "the election was conducted using a Board-sanctioned voting booth." Clearly, the Board-sanctioned voting booth in *Physicians & Surgeons Ambulance Serv.* was designed to effectuate the laboratory conditions required by the Board, much like the election proceedings outlined and set out in the Casehandling Manual, Form NLRB-722 and Board precedent. In the instant case, however, the Board Agent did *not* follow the Board-sanctioned election rules. Rather, the Board Agent violated those rules in several respects, destroying the laboratory conditions necessary to ensure the free choice of employees protected by Section 7 of the NLRA.

The Board's substantive arguments regarding LifeSource's objections must also fail. First, the Board's contention that the Board Agent permitting the Election Observers two extended absences at the same time without securing or taping the ballot box did not result in any impropriety is based on outright distortion of the record. (See LifeSource Br. 22-23; Board Br. 13-14) The Board cites *Sawyer Lumber*, 326 NLRB 1331, 1332, n.8 (1998), for the proposition that such objections should be overruled when the Board Agent stays in the voting room and maintains control over the box while the Observers are absent. Here, however, there is no evidence and no investigation conducted into what the Board Agent did or did not do when she impermissibly permitted the Observers to twice

leave the voting area at the same time. Therefore, unlike in *Sawyer Lumber*, wherein the decision was rendered after the parties *had the benefit of a hearing*, there is no basis upon which the Board can argue that no electoral improprieties occurred when the Observers were absent. There is no, never mind "substantial", evidence of record to support such a conclusion.

The Board suggests that LifeSource's articulation of the many improprieties that could logically occur with the Board Agent at the helm is unfounded and unrealistic. (Board Br. 15) The Board also feigns offense at LifeSource's argument that the Board Agent, assuming she gave evidence to the Regional Director, may have "tempered" her testimony so as to avoid blame. It is well known that one with a stake in the outcome of a matter is a less reliable witness, and pointing that out hardly constitutes LifeSource "impugn[ing] the integrity" of the Board Agent as the Board contends. (Board Br. 15, n.7)

The Board additionally attempts to gloss over the inconsistencies between the absence of the Election Observers and the instructions in Form NLRB-722, but its assertion that the instructions in Form NLRB-722 were not violated is conclusory and unsupported. (Board Br. 14-15, n.6) First, it is unknown whether any voters came to vote during either of the periods when both Observers were absent and, if so, whether they were turned away or permitted to vote. In addition, the Board dismisses LifeSource's assertion that the Board Agent failed to follow

the instructions on Form NLRB-722 based on the specific instructions LifeSource pointed out in its Brief (LifeSource Br. 22-23, n.9), but *all* of the instructions on the Form must be considered. For example, the instructions state that the observer should, *inter alia*, "Monitor the election process [and] [h]elp identify voters." (J.A. 3) Observers are also instructed to, "Report any unusual activity to the Board Agent as soon as you notice it." The Observers could not comply with these instructions during the breaks sanctioned by the Board Agent.

The Board additionally makes the faulty argument that LifeSource's objection that the Board Agent improperly permitted voters to interact with the *Excelsior* list is unfounded. (Board Br. 17-18) The Board does not address LifeSource's concern about individuals keeping a list of who had voted. Not only did the Board Agent impermissibly leave the marked up *Excelsior* list in plain view, but, "Voters walked up to the table and pointed out, and on, their names on the Excelsior list being used by the Observers to mark employees who had already voted." (LifeSource Br. 21) In a closely contested election, there is nothing "illogical" about being concerned that employee(s) who interacted with a clearly marked up list of who had and had not voted may have maintained a mental list of the same, especially where the unit at issue is so small (22 eligible voters) and the outcome decided by a single vote. Notably, the Board cites *Sawyer Lumber*, *supra*, and *Avante at Boca Raton* to support its attempt to undermine the serious

implications of list-keeping on an election. 323 NLRB 555 (1997), aff'd mem., 54 F. App'x 502 (D.C. Cir. 2002). The Board's decisions in those cases, however, came *after an evidentiary hearing*. No such hearing occurred in the instant matter.

The Board attempts to brush aside the irregularity of employees interacting with the *Excelsior* list by arguing that such deviations from its election guidelines do not constitute grounds for overturning an election. Contrary to the Board's assertion, the Board Agent's actions were not consistent with the Casehandling Manual. (See n.2) In fact, the Board Agent's deviations from the Board's Casehandling Manual were serious, involving the grave potential of an employee keeping a list of voters. The Board's argument that the guidelines in its Casehandling Manual can be discarded at its whim is unsupported by logic and Board law. While isolated and minor deviations may be permissible on occasion, numerous and serious deviations such as those in this case simply cannot be ignored under the guise that the Board's election rules are mere "guidelines." See *International Stamping*, 97 NLRB 921 (1951) ("Election rules which are designed to guarantee free choice must be strictly enforced against material breach in every case, or they may as well be abandoned").

The Board's argument that the Board Agent's ten minute absence from the voting area does not warrant overturning the election is also unfounded. First, the Board admits that "the preferred practice is for the Board Agent to retain custody

of unmarked ballots." (Board Br. 20, n.10) The Board asserts that LifeSource failed to show that the Board's departure from this preferred practice had a material effect on the election. (Board Br. 20, n.10) To the contrary, LifeSource provided concrete examples of events that could have serious, material impact on the election, including that the Observers may have checked off one or more names on the *Excelsior* list while the other Observer was distracted, especially if both of the Observers did not have the list within their view at all times.[5]

The crux of the Board's argument is that "[t]he Board Agent's leaving the ballots with the observers would not be grounds for overturning the election; indeed, the Board has frequently upheld elections under such circumstances." (Board Br. 19) There is one main problem with this argument: the Board Agent did not leave the ballots with the observers in this case. The three Board decisions and one case the Board cites to support its arguments are entirely distinguishable from the instant case because in those instances, the Board Agent at issue left the

[5] The Board attempts to assert that LifeSource is improperly enlarging the scope of its third objection by questioning whether the ballot box was protected or the eligibility list was improperly marked during the Board Agent's absence. The Board's attempts to mischaracterize these as separate arguments must fail. These are examples of improprieties which could easily result from the Board Agent's failure to secure the ballots. LifeSource has consistently raised its concerns with tampering of the ballots and other improprieties arising from the Board Agent's failures. (*See* J.A. 28). Thus, LifeSource is in no way enlarging its objections, but only pursuing the objections previously articulated.

blank ballots with the observers. (Board Br. 19-20)[6] Conversely, in this case, the whereabouts of the ballots during the Board Agent's absence remain unknown to this day.[7] The specter of impermissible tampering with the ballots, or chain voting, is great. The Board's attempt to minimize the specter of chain voting in this case (Board Br. 20-21, n.11) is undone by the fact that very cases it cites were determined following a hearing. Therefore, the Board's citation to such cases bolsters the argument that a hearing must be held where electoral improprieties exist.

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[6] The Board cites *Elizabethtown Gas v. NLRB*, 212 F.3d 257, 267-68 (4th Cir. 2000), to support its contention that the Board has upheld elections in the face of Board Agent misconduct, but the case is distinguishable. First, the Board Agent misconduct alleged in *Elizabethtown Gas* involved requiring all voters to use the eraserless pencils that come with the NLRB election kit. Second, the Court's holding was simply that, "Where, *in all the circumstances*, an NLRB Agent's conduct does not raise a reasonable doubt regarding the fairness or validity of the election, even actions that are contrary to NLRB policy do not constitute grounds for setting aside the results of the election." *Id*. (emphasis added) Therefore, *Elizabethtown Gas* supports remanding this matter, because the irregularities here, singularly and most certainly together, more than raise a reasonable doubt about the fairness or validity of the election such that a new election or hearing must be held.

[7] The Board attempts to minimize its admission that the ballots were out of the Board Agent's control and scrutiny during her ten-minute restroom break. (Board Br. 19, n.9) Yet, the Board never states where the ballots were during the Board Agent's absence. In fact, the Regional Director clearly ignored this missing information in his Report, making his decision "[r]egardless of the location of the unmarked ballots …" (J.A. 26) The Board's consistent failure to identify the location of the ballots – a fact that, without a hearing, only the Board can determine – is fundamentally an admission that the ballots were out of the Board Agent's control and scrutiny.

The Board's argument that the cumulative effect of the Board-sanctioned misconduct need not be taken into account in determining whether to overturn the election or hold a hearing is based on its circular argument that LifeSource's objections are "insubstantial" and "without substantive support." (Board Br. 21) However, LifeSource's objections to the Board's laxity in conducting the election (as well as its so-called "investigation" into the objections) warrants at the bare minimum a hearing in order to insure that employee rights are effectuated. The Board attempts to support its arguments by citing to *Amalgamated Clothing and Textile Workers Union v. NLRB*, 722 F.2d 1559 (D.C. Cir. 1984), but it is once again crucial to recognize that the parties were *afforded a hearing* in that case prior to the Board's decision about whether the employer's objections were "substantial." The Court's decision was largely based on its insistence that the "Board is much closer to the facts than we as an appellate court can possibly be," trusting the Board's reliance on the Hearing Officer's conclusions about credibility and the emotional climate at the time of the election. *Id.* at 1562-63. LifeSource, however, was not afforded the opportunity to bear out the facts in a hearing to ensure that its employees' Section 7 rights were not violated.

The Board also attempts to point out purported "distinguishing" factors in *Fresenius USA Manufacturing, Inc.,* 352 NLRB 679 (2008), a decision with facts similar to the instant matter wherein the Board ordered a new election due to the

cumulative effect of the Board Agent's misconduct.[8] The Board argues that the facts in *Fresenius* are distinguishable because the Board Agent improperly denied the employer an opportunity to monitor the ballot count and was color blind. (Board Br. 19-20, *Fresenius* at *2) However, the Board points out a difference without distinction. Permitting both Election Observers to leave twice, allowing voters to interact with the *Excelsior* list, and failing to secure the ballots are just as severe electoral irregularities, if not more so, than the bases for the objections in *Fresenius.* Of particular note, the Board in *Fresenius* did not hold that any of the electoral irregularities created an actual shift in the outcome of the election, rather, the specter that such irregularities could have altered the outcome was sufficient, as it should be here, for setting aside the election, or at the very least investigating LifeSource's objections by holding a hearing. In particular, the Board held that it was "unnecessary to pass on whether the irregularities in this election, considered separately or in various combinations, would warrant setting aside the election … we find that the cumulative effect of these irregularities … raises a reasonable doubt as to the fairness and validity of the election. This is especially so

[8] LifeSource recognizes that *Fresenius USA* was decided with a Board panel of only two members and lacked a quorum. However, the Board adopted *pro forma* the findings and recommendations of its administrative law judge in *Durham Sch. Svcs.*, 360 NLRB No. 86, 2014 WL 1692788, *1, n.4, *10-11 (2014), which relied in large part on the Board's decision in *Fresenius USA*.

considering the closeness of the election, where even one mistake in the distribution or counting of the ballots could have altered the election outcome."

The Board's companion argument that the closeness of the election is not grounds for setting aside, or at least holding a hearing in the instant matter, is likewise baseless. The Board incorrectly cites to several cases to support its claim, including *NLRB v. WMFT*, 997 F.2d 269, 279-80 (7th Cir. 1993), in which the Seventh Circuit upheld the finding of the Board (which, again, unlike the instant matter, occurred *after a hearing*), that the Board Agent's "disturbing pattern of activity" was insufficient to overturn the election. (Board Br. 20-21) The misconduct in that case was unmistakably less severe than the Board Agent's created/sanctioned misconduct in the instant matter. For these several reasons, LifeSource's employees are entitled to a new election, or, at the very least, there should be a hearing on LifeSource's objections.[9]

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[9] The Board attempts to address LifeSource's due process arguments in a footnote, relying on *Brainiff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453 (D.C. Cir. 1967), in doing so. (Board Br. 24, n.15) In *Brainiff Airways*, however, the court explained that, "Agencies are no more bound to enter for the record the time, place, and content of their deliberations than are courts." LifeSource's contention that the Board "rubber-stamped" the decision of the Regional Director comes not from the belief that it is entitled to the Board's closed-door deliberations. Rather, it is derived from the complete lack of discussion on the merits contained in the Board's various Decisions and Orders. If the Board considered the matter *de novo*, some discussion of the reasoning for its decision is warranted. Absent same, how does this Court conclude that there is substantial evidence of record to support the Board's Decision?

D. The Passage of Time and Turnover of Employees Support Holding a New Election to Effectuate the Section 7 Rights of Current Employees

In both its opening brief and this reply brief, LifeSource has provided sufficient evidence to require a new election, a hearing, or, at the very least, access to compulsory process. The passage of time and turnover of employees since the original election, however, demonstrate that a new election is the most appropriate remedy in this matter. The Board asserts that the passage of time and turnover of employees should not be considered independent grounds for setting aside an election.[10] (Board Br. 30) While these factors *do* support overturning the election, the Board correctly points out that they are most compelling when considered in the context of this Court's decision regarding the proper disposition of the erroneously decided Decision and Order. The substantial election irregularities that destroyed the laboratory conditions required in a representation election are enough to justify overturning an election on their own. Coupled with the passage of time and the turnover of employees, however, it is clear that a new election must

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[10] The Board cites to this Court's decision in *Pearson Educ., Inc. v. NLRB*, 373 F.3d 127 (D.C. Cir. 2004), to demonstrate that "Courts regularly uphold Board bargaining orders that issued multiple years after elections." (Board Br. 30) Notably, the delay in that case was perpetuated by the normal processes involved in considering objections to an election, including two elections and a remand from this Court that resulted in a hearing on the objections. The delay in the instant case resulted from significant and highly unusual circumstances involving the Board and the judicial effects of the *Noel Canning* decision, as more fully explained in LifeSource's opening brief. 134 S.Ct. 2550 (2014) (LifeSource Br. 47-48)

be held to ensure that current employees are able to exercise their Section 7 rights free and clear from substantial election irregularities.

CONCLUSION

This entire appeal is occasioned because of numerous improper actions of the Board, including: (i) the Board Agent's failure to maintain laboratory conditions during the election; (ii) the Regional Director's failure to conduct an investigation; (iii) the Regional Director's failure to hold a hearing or at least permit LifeSource access to compulsory process; and (iv) the Board's continued insistence that this Court turn a blind eye to the Board's utter disregard for its own rules, decisions and this Court's jurisprudence, to simply uphold a Union "win" in the election. However, this Court's jurisprudence provides a backstop from such administrative overreach and compels that this matter be remanded with instructions for a new election, a hearing or, at the very least, access to compulsory process in order to protect and best effectuate the statutory rights of the impacted employees.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing Reply Brief of Petitioner LifeSource was filed electronically on December 23, 2015. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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